SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 41

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. ROGERS, and HENRY WADE, District Attorney, Dallas County,

Appellants,

vs.

BRENT STEIN,

Appellee.

On Appeal From the District Court for the Northern District of Texas.

Motion for Leave to Participate in the Oral Argument by Stanley Fleishman, Esq., as Amicus Curiae in Support of Appellee.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 565

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County,

Appellants,

vs.

BRENT STEIN,

Appellee.

On Appeal From the District Court for the Northern District of Texas.

Motion for Leave to Participate in the Oral Argument by Stanley Fleishman, Esq., as Amicus Curiae in Support of Appellee.

Mel S. Friedman, Esq., and Stanley Fleishman, Esq., amici curiae on behalf of appellee, respectfully move that leave be granted to Stanley Fleishman to participate in the oral argument as amicus curiae in support of appellee. A brief amici curiae by the said Mel S. Friedman and Stanley Fleishman, on behalf of appellee, has heretofore been filed with the court with the consent of all the parties to the cause.

1. The interest of amici in this case arises from the fact that they are counsel in a profusion of cases, over three hundred in number, in federal and state

courts throughout the United States involving the same constitutional issue before the court in this case, namely, whether it is constitutionally permissible for a State to punish the dissemination of allegedly obscene material to adults, in the light of the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments to the United States Constitution. A summary of the pending cases, both civil and criminal, is annexed as an appendix to this motion.

The specific case herein involves a single publisher of an underground bi-weekly newspaper. Amici represent a multifold number of producers, distributors and exhibitors of motion picture films, and a broad and diversified number of publishers, distributors, wholesalers and retailers of books, magazines, and other related media of communication. The interest of these persons in the constitutional issue involved in the case herein is, therefore, substantial.

The cases in which amici are involved, where the same issue is presented, are pending in Arizona, California, Hawaii, Missouri, North Dakota, Ohio, Oregon, Tennessee, Texas and Washington. The interest of the community is, therefore, also meaningfully involved in the case herein.

2. Amici believe that oral argument will provide assistance to the court, not otherwise available. The formulation of standards and criteria, relative to the dissemination of material dealing with sex and nudity to adults, by the court, involves considerations reaching beyond the particular concrete situation presented in the case herein. There is need for the court to know, it is submitted, the operation and effect of obscenity stat-

utes and their impact upon the exercise of freedoms of speech and press by the adult community throughout the United States. Oral argument would offer the opportunity to present to the court essential facts, important data, and empirical evidence; as well as a summary of diversified experiences which bear importantly upon the substantial constitutional question presented to the court. The argument would inform the court with respect to the chilling effect of obscenity statutes upon the circulation of constitutionally protected material to adults. There is also probative data available that obscenity statutes for adults necessarily lend themselves to arbitrary, discriminatory and selective enforcement. The information and evidence which amicus is prepared to furnish the court on oral argument will, it is submitted, be fruitful, illuminating and helpful to the court in determining the substantial constitutional issue presented in the case.

WHEREFORE, amici respectfully pray that the motion for leave to participate in the oral argument by Stanley Fleishman, as amicus curiae, be granted, and that the court allot such time for oral argument as may seem proper.

Dated: March 4, 1970.

Respectfully submitted,

STANLEY FLEISHMAN,
Amicus Curiae.

MEL S. FRIEDMAN,
Amicus Curiae.
Amici Curiae, Movants.

APPENDIX.

Pending Cases Involving Constitutionality of Obcenity Statutes Proscribing Dissemination of Material to Adults.

FEDERAL CASES

Arizona

Grove Press, Inc., v. Mummert, et al., U.S.D.C. D.C. Ariz., No. Civ. 69-503 Phx. (three-judge court).

California

United States v. 77 Cartons of Magazines, etc., U.S. Court of Appeals for the Ninth Circuit, No. 24676.

Three-judge court:

Luros v. Younger, et al., U.S.D.C. C.D. Calif., No. 69-432-IH;

World News, Inc., v. Davis, et al., U.S.D.C. C.D. Calif., No. 69-2477-IH;

Grove Press, Inc., v. Bergna, et al., U.S.D.C. N.D. Calif., No. 52300;

Grove Press, Inc. v. Lynch, et al., U.S.D.C. E.D. Calif., No. F-383 Civ.;

United States v. Thirty-Seven (37) Photographs, U.S.D.C. C.D. Calif., Civ. No. 69-2242-F.

Single-judge court:

Grove Press, Inc., v. Younger, et al., U.S.D.C. C.D. Calif., No. 69-2554-FW;

Alegret v. Arnebergh, et al., U.S.D.C. C.D. Calif., No. 70-170-ALS;

Falzett v. Davis, et al., U.S.D.C. C.D. Calif., No. 70-78-R.

Hawaii

Lee, et al., v. Sheater, et al., U.S.D.C. D.C. Hawaii, Civ. No. 3012.

Missouri

United States v. Lang, et al., U.S.D.C. W.D. Mo., No. 23038-4.

North Dakota

United States v. Spinar, et al., U.S.D.C. D.C. N.D., Crim. No. 9292.

Ohio

United States v. Linetsky Products, Inc., et al., U.S.D.C. S.D. Ohio, W.D., Crim. No. 11364.

Oregon

Hayse, et al., v. Van Hoomissen, et al., U.S.D.C. D.C. Ore., Civ. No. 69-743 (three-judge court).

Tennessee

ABC Books, et al., v. Benson, et al., U.S.D.C. M.D. Tenn., Nashville, Civ. No. 5528 (three-judge court).

Texas

Three-judge court:

Gholson, et al., v. Short, et al., U.S.D.C. S.D. Tex., Houston Div., No. CA-68-H-1005;

Newman, et al., v. Connover, et al., U.S.D.C. N.D. Tex, Dallas Div., No. CA-3-3134;

Texas Bookmark Corp., et al., v. Curtis, et al., U.S.D.C. N.D. Tex., Amarillo Div., No. CA-2-793;

West v. Cherry, et al., U.S.D.C. N.D. Texas, Lubbock Div., No. CA-5-694;

Texas Bookmark Corp. v. Cherry, et al., U.S.D.C. N.D. Tex., Lubbock Div., No. CA-5-695;

West, et al., v. Short, et al., U.S.D.C. S.D. Tex., Houston Div., No. CA-69-H-999;

Wimberly, et al., v. Calvert, et al., U.S.D.C. W.D. Tex., Waco Div., No. W-69-CA-56.

Washington

Grove Press, Inc., v. Brockett, et al., U.S.D.C. E.D. Wash. N.D., No. 3300 (three-judge court).

* * * * * *

STATE CASES

California

(Books, magazines, etc., and films other than "I Am Curious-Yellow")

People v. Luros, et al., Supreme Court of California, Crim. No. 13153.

People v. Sayles, et al., Appellate Department of Superior Court of California, County of Los Angeles, No. CR. A-8710.

World News, Inc., v. Davis, et al., Superior Court for the County of Los Angeles, No. 965366.

People v. Chapman, et al., No. 31592, and 106 other separate cases variously numbered from 337520 to 659929, in the Municipal Court for the Los Angeles Judicial District;

People v. Goulet, No. 93175, and 3 other separate cases variously numbered from 94350 to 094558, in the Municipal Court for the Pasadena Judicial District;

People v. Marsh, No. 24396, and 7 other separate cases variously numbered from 24584 to 24610, in the Municipal Court for the Beverly Hills Judicial District;

People v. Baker & Furnari, No. 69800, Municipal Court for the Citrus Judicial District;

People v. Furnari, No. 55738, Municipal Court for the El Monte Judicial District;

People v. Rockford, No. 91684, and 2 other separate cases in the Municipal Court for the Long Beach Judicial District;

People v. Arleo, No. 57104, Municipal Court for the Inglewood Judicial District;

People v. Jones, et al., No. 24203 Municipal Court for the Santa Anita Judicial District;

People v. Johnson, et al., No. 118393 Municipal Court for the Central Orange County Judicial District;

People v. Miranda, et al., No. ....., Municipal Court for the Alameda Judicial District;

People v. Chapman, No. 12662, Municipal Court for the Fremont-Newark Judicial District;

People v. Topel, No. 77216, and 6 other separate cases variously numbered from 80698 to 82420, in the Municipal Court for the San Diego Judicial District.

("I Am Curious-Yellow")

People v. Kappas, No. 351946, and 4 other separate cases variously numbered from 351947 to 351984, in the Municipal Court for the Los Angeles Judicial District;

People v. Baffa, No. 32982, and 3 other separate cases in the Municipal Court for the Glendale Judicial District;

People v. Loews Theatre Corp., No. 57864, Municipal Court for the Inglewood Judicial District;

People v. Shepard, et al., No. 102284, and 19 other separate cases variously numbered from 102250 to 102604, in the Municipal Court for the South Bay Judicial District;

People v. United Artists Theatre, No. 93010, and 42 other separate cases variously numbered from 93195 to 93213, in the Municipal Court for the Long Beach Judicial District;

People v. Alford, et al., No. 53307, Municipal Court for the Harbor Judicial District;

People v. Meyer, et al., No. 31730, Municipal Court for the West Orange County Judicial District;

People v. St. Onge, No. 45530, Municipal Court for the Merced County Judicial District;

People v. Shaw International Theatres, Inc., No. 13024-A, Municipal Court for the San Jose-Milpitas Judicial District.

APPELLEE'S BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 41

DYSON, CHIEF OF POLICE, CITY OF DALLAS, et al.,
Appellants,

v.

BRENT STEIN,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

APPELLEE'S BRIEF ON REARGUMENT

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IN THE
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DYSON, CHIEF OF POLICE, CITY OF DALLAS, et al.,
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APPELLEE'S BRIEF ON REARGUMENT

The Court in its notation in *Perez v. Ledesma*, No. 60, October term, 1970, requested in that case brief and argument on the propriety of declaratory relief. For fear that our initial brief did not adequately treat this question in our own case, we tender for consideration this Brief on Reargument.

STATEMENT OF THE CASE

Plaintiff's Complaint (App. 30-1) alleged a cause of action on behalf of the Plaintiff Stein, publisher of the "Dallas Notes" and on behalf of a class "composed of present and future employees of and contributors to the 'Dallas Notes' and persons engaged in the distribution of the 'Dallas Notes' . . ." The Complaint sought, in addition to injunctive relief, judgment declaring the Texas obscenity statute unconstitutional, alleging that Plaintiff "wishes to continue publication and distribution of the 'Dallas Notes' with content of a nature similar to that which has exposed him to arrest and prosecution in the past. Plaintiff fears future arrest and prosecution under Article 527 unless his rights thereunder are declared by this Court" (App. 37).

Plaintiff's uncontroverted affidavit (App. 61) in support of summary judgment alleged an "intention to continue publication of the 'Dallas Notes' in Dallas County, Texas and . . . to include in the newspaper material similar to that contained in the previous issues of the 'Dallas Notes' which have been characterized by the Dallas police, (sic) the District Attorney's office as constituting obscenity in violation of Article 527 of the Penal Code of the State of Texas."

The Court's memorandum opinion concluded that Plaintiff was entitled to declaratory and injunctive relief. From the judgment entered in accordance with the Court's opinion, Defendant has perfected this appeal.

ARGUMENT

Congress intended that declaratory relief would be available to determine the constitutionality of state criminal statutes. The Senate Judiciary Committee report on the bill concluded:

> "Finally, it may be said that the declaratory-judgment procedure has been molded and settled by thousands of precedents, so that the administration of the law has been definitely clarified. The Supreme Court mentioned one of its principal purposes in *Terrace v. Thompson* . . . when it said: 'They are not obligated to take the risk of prosecution, fines, and imprisonment and loss of property in order to secure an adjudication of their rights.' " *Sen. Rep.* 1005, p. 6, 73rd Cong. 2d Sess., (1934).

In *Terrace* the Supreme Court had affirmed the grant of federal injunction against a state prosecution, holding:

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable . . ." *Terrace v. Thompson,* 263 U.S. 197, 214 (1923).

It seems equally clear that declaratory relief is appropriate in many instances when injunction is not, for while "there are similarities between injunctions and declaratory judgments, there are also important differences," *Mitchell v. Donovan,* U.S. , 90 S. Ct. 1763, 1765 (1970). Principal among these differences is that declaratory relief "involves none of the dangers to which Congress was addressing itself" in enacting 28 U.S.C., Sections 2281 and 2282. *Kennedy v. Mendoza-Martinez,* 372 U.S. 155 (1963), and a "court may grant declaratory relief even though it chooses not to issue an injunction . . ." *Powell v. McCormack,* 395 U.S. 486, 499 (1969).

Assuming then that declaratory relief in the federal courts is an appropriate means of testing the constitutionality of state criminal statutes, and recognizing that declaratory relief is significantly less disruptive than injunctive relief, does the

pendency of a prosecution under the state's criminal statute preclude resort to federal declaratory relief?

The facts of the present case amply justify the lower court's use of declaratory relief. This is not a case in which the Plaintiff sought to preempt pending state prosecutions by resort to the federal forum. Rather, the Plaintiff was engaged in the regular publication of a newspaper. The previous arrests by the Dallas Police, and the pending prosecutions, strongly and clearly implied the threat of future arrests and prosecutions under the Texas obscenity statute. Plaintiff's federal action was addressed to these future threats[1]. There was no likelihood that the pending prosecutions would dispose of the controversy: the constitutional issues had already been unfavorably decided by the Texas courts,[2] and acquittal on the pending criminal cases would be no guard against future charges as to other issues of the newspaper.

Congress contemplated that federal declaratory relief would be appropriate under similar circumstances. The Senate Judiciary Committee cited as justification for the enactment of the federal declaratory judgment statute the Tennessee decision in *Erwin Billiard Parlor v. Buckner*, 156 Tenn. 278, 300 S.W. 565 (1927). *Sen. Rep.* 1005, p. 3, 73rd Cong., 2d Sess. (1934). In *Erwin Billiard* the Tennessee Supreme Court had approved the grant of declaratory relief at the behest of pool hall operators who had been "served with notice by the Sheriff that he would procure warrants against them and close their places of business and continue to prosecute them for every separate offense committed by them contrary to the provisions of said statute. . ." Relief had been sought by the Plaintiffs against the

[1] Injunctive relief was sought only as to any future prosecution, pending prosecutions were specifically excluded from the prayer for relief (App. 77).

[2] The Texas Court of Criminal Appeals had held that the statute's exemption of daily and weekly newspapers was neither unreasonable nor arbitrary, *Carter v. State*, 388 S.W. 2d 191 (Tex. Crim. App., 1965); and had upheld conviction for possession of obscene material, *Sullivan v. State*, 401 S.W. 2d 246 (Tex. Crim. App., 1966).

Sheriff, the foreman of the grand jury and the District Attorney General. Stein certainly stands as well as the Tennessee pool hall proprietors in seeking declaratory relief.

Declaratory relief has traditionally been considered available to business institutions facing threats similar to that confronting Stein:

> "The fact that the plaintiff in a declaratory proceeding has already been subjected to a criminal prosecution, which is pending at the time that the declaratory proceeding is initiated, would not in any manner militate against the right to obtain, or the court to grant, a declaratory judgment, with respect to the plaintiff's rights under the law he is charged with having violated, and to clarify such rights, the declaratory action is brought, if such criminal prosecution involves a property right or right to engage in a business or a profession." Anderson, *Actions for Declaratory Judgment*, Section 731, at 1572 (Harrison Company, Atlanta, Ga., 1951); see *Watson v. Centro Espanol de Tampa*, 30 S. 2d 288 (S. Ct. Fla. 1947); *Ostrander v. Linn*, 22 N.W. 2d 223 (S. Ct. Iowa, 1946).

CONCLUSION

Appellee respectfully submits that the three-judge court below did not abuse its discretion in granting declaratory relief.

Respectfully submitted,

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